



September 28, 2009

Via electronic mail

Executive Officer John Robertus and Members of the Board
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: Comments on Revised Tentative Order R9-2009-0002.

Dear Mr. Robertus and Members of the Board:

We write in response to the August 12, 2009 draft of the South Orange County MS4 permit, Tentative Order No. R9-2009-002, Permit No. CAS 0108740 (“Tentative Order” or “Permit”). We have been involved in the drafting process for more than two years now, and appreciate the opportunity to comment on the current draft of the Tentative Order.

We note with approval the progress the Regional Board has made towards drafting a Permit that will meet the Clean Water Act’s maximum extent practicable (“MEP”) standard, and again approve of the Board’s decision to omit lawn irrigation from the list of permitted non-storm water discharges in section B.2. of the Discharge and Legal Provisions portion of the Permit. Still, we remain concerned with the language of several of the Permit’s LID and Development Planning Component provisions and, in particular, with the Permit’s continued allowance of non-retention practices such as biofiltration to meet a site’s LID compliance obligations. We have raised many of these issues in our past comment letters (which we incorporate by reference here),¹ and find it troubling that the Board has failed to address the problems identified with several key components of the Permit’s Development Planning section. In the paragraphs below, we identify these and additional concerns, in the hope that the Board will revise the Permit in a manner that is consistent with the MEP standard, that will serve to protect the region’s water quality and public health.

¹ See NRDC letters to the San Diego Regional Water Quality Control Board: April 3, 2007; August 22, 2007; January 24, 2008; March 5, 2008; May 15, 2009; and, June 19, 2009.

A. Biofiltration Should Not Count Towards the Permit's LID Obligations

Section F.1.d.(4)(d)(i) requires a site to use LID BMPs to retain onsite the runoff from a design storm event.² Section F.1.d.(4)(d)(ii), in turn, allows a site to biofiltrate any portion of that runoff which cannot feasibly be retained onsite. The section allows biofiltered runoff to count toward LID retention requirements, and would conceivably allow a site demonstrating technical infeasibility of onsite retention to discharge all of its stormwater to the MS4 system through biofiltration, without undertaking any offsite mitigation. But, as discussed in our previous comment letters, biofiltration is not as effective a means of reducing pollutant load as onsite retention, nor does biofiltration ensure downstream impacts such as flooding or erosion will be reduced to the same extent.³ As a result, biofiltration without offsite mitigation falls short of the maximum extent practicable standard.

Other jurisdictions have developed policies that reflect the strengths of retention and the shortcomings of biofiltration. As discussed in our previous letters, Philadelphia, West Virginia, and Anacostia (Washington D.C.) have adopted standards that infiltrate, use onsite, or evaporate all precipitation except that which exceeds a specified storm volume. More locally, the Los Angeles Regional Water Quality Control Board recently approved NPDES No. CAS00402, the MS4 permit for Ventura County and its incorporated cities. That permit does not, like the current draft Permit, allow biofiltration BMPs to count toward LID obligations. Rather, the Ventura permit requires that a project employing biofiltration must compensate through mitigation measures.

We recommend that you revise your Permit in a similar manner so that a site must mitigate offsite any reduction in the removal of pollutants resulting from the use of biofiltration instead of retention-based BMPs. Such a move could help to ensure compliance with the Clean Water Act and would further serve important policy goals of the State. Given our current state of drought, Governor Schwarzenegger has issued a proclamation calling on water agencies to take

² The twenty-four hour 85th percentile storm event.

³ In this vein, we have previously pointed out that both environmentalists and industry representatives agree that "biofiltration," is a vague term that fails to provide sufficient guidance, and is therefore subject to abuse. (*See* NRDC letter to San Diego Regional Board, June 19, 2009; Correspondence from Dr. Mark Grey to Mr. Michael Adackapara, Santa Ana regional Water Quality Control Board, February 13, 2009, at 6) While the draft Permit does place a limit on the volume of a biofiltration BMP of 0.75 times the design storm volume (section F.1.d.4.(d)(ii)), we believe that if biofiltration is to be used at all, even if in conjunction with participation in the LID waiver program, further clarification and guidance is needed, in line with our comments of June 19. Irrespective of such clarification and guidance, we reserve our rights to challenge this provision.

additional actions to protect and enhance water supplies.⁴ By requiring offsite mitigation through practices that retain stormwater runoff, captured or infiltrated water could be used to increase water supplies through onsite use or recharging groundwater, in furtherance of this goal. In contrast, as currently written the draft Permit would allow most or all of that water to be discharged through use of biofiltration, without any volume retained to increase water supplies.

Finally, given the Permit's current language we see no reason why the Regional Board should require a site to demonstrate that biofiltration is infeasible prior to deciding to implement conventional controls and participate in the LID waiver program under section F.1.d.(4)(d)(iii). The purpose of the permit's LID BMPs sizing criteria requirements is to reduce harmful water impacts to the maximum extent practicable. While onsite retention ensures that 100 percent of pollutants in the design storm volume of water never leave the site, both biofiltration and conventional controls fail to reduce impacts as effectively. But, as currently drafted, the Tentative Order would at least require a site employing conventional controls to participate in the LID waiver program, thereby ensuring that the site would achieve an equivalent level of pollutant reduction within the same hydrologic subdivision or unit. Thus, while biofiltration may in many circumstances represent an approach for addressing stormwater runoff that is preferable to the use of conventional controls, a site implementing conventional controls could counterintuitively achieve greater pollutant reduction due to its required participation in the waiver program.

The Regional Board can, and should, correct this result by requiring participation in the LID waiver program for any site implementing biofiltration to meet its LID obligations. But in the absence of any such requirement, a site should be able to participate in the waiver program even if biofiltration is a feasible practice. In the case where a site is able to demonstrate technical infeasibility of onsite retention, the site should be permitted to choose between biofiltration on the one hand, and conventional controls with participation in the waiver program on the other, and should not have to demonstrate that the use of biofiltration is infeasible as a prerequisite.

B. The Permit Should Require that Watershed-Based Projects Demonstrate the Infeasibility of Onsite Retention Before Allowing the Use of Biofiltration or Conventional Controls and Offsite Mitigation Measures.

Section F.1.c.(8) of the Permit provides that, for watershed or sub-watershed based development projects,⁵ "Regional BMPs may be used provided that the BMPs capture and retain the volume of runoff produced from the 24-hour 85th percentile storm event as defined in section F.1.d.(6)(a)(i)," mimicking the performance standard required for Priority Development Projects

⁴ Gov. Arnold Schwarzenegger, Proclamation, State of Emergency: Water Shortage, Feb. 27, 2009, available at <http://gov.ca.gov/proclamation/11557>.

⁵ Greater than 100 acres in total project size or smaller than 100 acres in size yet part of a larger common plan of development that is over 100 acres.

under section F.1.d.4(d)(ii). However, unlike the Priority Development Projects provision, which requires that a site demonstrate the technical infeasibility of onsite retention prior to implementing biofiltration or prior to implementing conventional treatment controls and participating in the Permit's offsite mitigation or in-lieu program, section F.1.c.(8) states that "[a]ny volume that is not retained by the LID BMPs, up to the design capture volume, must be treated using LID biofiltration," with no required demonstration of infeasibility. Likewise, section F.1.c.(8) states that "[a]ny volume up to and including the design capture volume, not retained by LID BMPs, nor treated by LID biofiltration, must be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6) . . . and participate in the LID substitution program," again failing to require that the site demonstrate infeasibility of onsite retention. The wording of these provisions suggests that, so long as a large development is involved, a site need not satisfy any threshold condition before deciding to biofiltrate water or substitute conventional treatment controls, rather than retain the water onsite.

Instead, the draft language gives the developer discretion to determine what volume of water to retain and what volume of water to biofiltrate or treat with conventional controls. Thus, (and in addition to the problems identified with allowing biofiltration to count towards a site's LID obligations above), a developer of a watershed based project could, for reasons completely unrelated to any finding of technical infeasibility, choose not to retain any water onsite, yet still comply with the permit's LID requirements. By failing to ensure that water will be retained onsite absent a finding of infeasibility, this provision fails to meet the MEP standard. To correct this oversight, the Permit should require that a large development demonstrate infeasibility of onsite retention prior to use of biofiltration or conventional treatment and participation in the Permit's LID substitution program.

C. Any LID Waiver Program Credit System Must be Closely Tied to Equivalent Water Quality Benefits to be Achieved and Subject to Public Notice and Comment

Section F.1.d.(7)(g) allows a copermitee "to implement a pollution credit system as part of the LID waiver program provided that such a credit system clearly exhibits that it will not allow PDPs to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements." While we withhold comment on the propriety of a credit system in general, we state here that any pollutant credit system designed by the copermitees must be clearly tied to resulting water quality benefits, and not to benefits derived in furtherance of other environmental or policy oriented goals. For example, while projects such as brownfield redevelopment, construction of low-income housing, or development close to public transportation or transit centers may serve admirable purposes—even purposes for which we may advocate—these types of projects also may not provide any demonstrable benefit in terms of water quality or pollutant load reduction. In addition to requiring that any credit system not result in a net impact from pollutant loadings over and above the impact from meeting LID requirements, F.1.d.(7)(g) should be revised so that it clearly requires any credit system to award credits only for measures that yield equivalent water quality benefits.

Further, in the current draft, any credit system that a copermitttee devises only need “be submitted to the Executive Officer for review and approval as part of the waiver program.” But putting such review authority solely in the Executive Officer shields the credit system from oversight and creates a self-regulatory scheme in violation of the Clean Water Act. In *Environmental Defense Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, 854-56 (9th Cir. 2003), the court explained: “[S]tormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulated entity ... Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act’s approach and philosophy.” Given that implementation of a credit system has the potential to exempt development participating in the LID waiver program from portions of the Permit’s core requirements to prevent the discharge of pollutants to the MS4 system, the public and the regional board must have a way to meaningfully review the system. In order to “ensure that each [MS4 permit] program reduces the discharges of pollutants to the maximum extent practicable,” any credit system under the LID waiver program should be publically noticed and presented for comment, and subject to approval by the Regional Board.

D. The Permit Contains a Clerical Error with Regard to the LID Waiver Program

Finally, we note that Sections F.1.c.(8) and F.1.d.(4)(c)(iii) both, while referencing the LID waiver program, refer to that program as falling under section F.1.d.(8). It appears that this section corresponds to the LID waiver program’s location in previous drafts of the Permit. In the current draft of the Permit, the LID waiver program is located at section F.1.d.(7), and all references to the LID waiver program in the Development Planning Component should be revised to correct this error.

E. Conclusion

We appreciate the progress the Regional Board has made in requiring LID practices and the use of onsite retention or mitigation through offsite mitigation or in-lieu payment. However, the Permit still fails to meet the Clean Water Act’s requirements and needs revision. We urge the Regional Board to improve the Permit and provide staff with clear direction on the necessary modifications, as discussed above.

Sincerely,



David S. Beckman

Noah Garrison

Jeremy Brown

Natural Resources Defense Council